



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bucky X-Ray International Corporation--Request for
Reconsideration

File: B-231353.2

Date: August 23, 1988

DIGEST

The noncompetitive award of an 8(a) contract after an announcement is published in the Commerce Business Daily that indicated that the requirement would be acquired through competition is not evidence of bad faith on the part of contracting officials.

DECISION

Bucky X-Ray International Corporation requests reconsideration of our decision, B-231353, July 25, 1988, 88-2 CPD ¶ ____, denying its protest. Bucky's original protest concerned the decision of the Defense Logistics Agency to set aside a contract under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), for portable x-ray equipment after the requirement had been synopsisized in the Commerce Business Daily (CBD) as a competitive set-aside for small business firms. Section 8(a) authorizes the Small Business Administration (SBA) to contract with government agencies and to arrange for performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses. These subcontracts need not be awarded competitively. We deny the request for reconsideration.

Bucky's request for reconsideration is based on two grounds. First, Bucky again raises the issue of bad faith on the part of the agency contracting officer founded upon the decision to place the procurement in the 8(a) program after it had been synopsisized as a small business set-aside. Second, Bucky notes that our decision did not address a question raised in its comments on the agency report. That question relates to an issue raised by another firm in a protest to which Bucky was not a party concerning the eligibility of the SBA subcontractor to receive the contract because of its alleged questionable small business size status.

043056/136638

To be considered, a request for reconsideration must meet two basic criteria. First, it must be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. Bid Protest Regulations, 4 C.F.R. § 21.12(b) (1988). Second, a request for reconsideration must contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.12.

With respect to the bad faith issue, our original decision noted that the alleged bad faith rested solely on the decision to withdraw the requirement from competitive bidding so that an award could be made under the 8(a) program. Our decision noted that a showing of bad faith requires proof that the contracting officer had a specific and malicious intent to injure the protester, that no such showing had been made, and that in the absence of bad faith, we would not object to a determination to cancel a competitive solicitation and to initiate a section 8(a) procurement even after bid opening. Our decision also noted that no solicitation had ever been issued for the procurement.

Bucky has offered no proof of the contracting officer's specific and malicious intent to injure it; instead, it continues to argue that the "advertised bid" was withdrawn after several months for the purpose of the 8(a) award even though no solicitation was issued. Bucky adds that its response to the invitation [to bid], which apparently consisted of frequent telephone calls and contacts with the agency after the CBD announcement, "formed an implicit contract between the parties that obligated the government to give fair consideration to Bucky and failure to do so constituted bad faith." While it is novel to suggest that a CBD announcement gives rise to an implied contract with the government to consider a nonbid, such a theory is not a showing of bad faith, it does not delineate any errors of law made in the original decision with respect to the bad faith issue, and it does not provide information that has not been previously considered.

With respect to the small business size status of the proposed 8(a) awardee that we failed to address in our original decision, that issue was not properly before us. The size status challenge was properly made by RMG Electronics, Inc., (another 8(a) firm) to the SBA, the agency which by law is vested with the authority to make such determinations; that protest of the awardee's size status was withdrawn prior to SBA's determination. Moreover, the protest to this Office by RMG Electronics, Inc. to which the protester in this case was not a party (B-231007), was

also withdrawn. There was therefore nothing to address on this issue in our original decision.

The request for reconsideration is denied.

for *Seamus Egan*
James F. Hinchman
General Counsel